IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-1276

DIAMOND M DRILLING CORPORATION
Petitioner

VERSUS

DAVID R. TARLTON AND
EXXON CORPORATION
Respondents

ON PETITION FOR A WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

PAGE

Table of Contents..... i

Table of Authorities.....ii

Listings of Divisions & Affiliates..... v

Opinions Below..... 1

Jurisdiction..... 2

Federal Rules of Civil and Appellate Procedure Included..... 2

Statement of the Case..... 2

Reasons for Denying the Writ..... 9

Post-Judgment Relief at the Trial Level.....10

Inflation.....29

Conclusion.....30

Certificate.....30

Appendix.....A-1

TABLE OF AUTHORITIES

PAGE

Federal Rule of Civil Procedure 50..... 9
17
18
28

Federal Rule of Civil Procedure 52.....20

Federal Rule of Civil Procedure 59..... 9
11-15
17
18

Federal Rule of Appellate Procedure 4.....12
13

CASES:

Albers v. Gant, 435 F.2d 146
(5th Cir. 1970).....12

Berenyi v. Immigration Director,
385 U.S. 630, 87 S.Ct. 666,
17 L.Ed.2d 656 (1967).....20

Boeing Co. v. Shipman, 411 F.2d 365
(5th Cir. 1969) (en banc).....21

Cornist v. Richland Parish School Board,
479 F.2d 37 (5th Cir. 1973).....15

Dimick v. Schiedt, 293 U.S. 474,
55 S.Ct. 296, 79 L.Ed. 603 (1935).....15

PAGE

Graver Mfg. Co. v. Linde Co.,
336 U.S. 271, 69 S.Ct. 535,
93 L.Ed. 672 (1949).....20

Gribble v. Harris, 625 F.2d 1173
(5th Cir. 1980).....12

Hebron v. Union Oil Co. of Calif.,
634 F.2d 245 (5th Cir. 1981)..... 8
22

Montgomery Ward & Co. v. Duncan,
311 U.S. 243, 61 S.Ct. 189,
85 L.Ed. 147 (1940).....28
29

McCormick v. Noble Drilling Corporation,
608 F.2d 169 (5th Cir. 1979).....23
24

Nodak Oil Company v. Mobil Oil Corp.,
526 F.2d 798 (8th Cir. 1975).....29

Tarlton v. Exxon, et al.,
688 F.2d 973 (1982)..... 1
2-8
21
23
24
26
27

United States v. Johnston, 260 U.S. 220,
45 S.Ct. 496, 69 L.Ed. 925 (1925).....19

PAGE

TREATISES:

5A Moore's Federal Practice
¶ 50.13[1] (2 ed. 1980).....28

11 Wright & Miller, Federal Practice
and Procedure § 2815 (1973).....14
15

LISTINGS OF DIVISIONS & AFFILIATES

Pursuant to Supreme Court Rule 28.1, counsel for respondent certifies that the following organizations are divisions or affiliates of Exxon Corporation.

DIVISIONS OF EXXON CORPORATION:

Exxon International Company

Exxon Chemical Company

Esso Middle East

Exxon Minerals Company

Exxon Company, U.S.A.

Exxon Enterprises

AFFILIATED COMPANIES:

Exxon Research and
Engineering Company

Esso Eastern, Inc.

Esso Exploration, Inc.

Imperial Oil Limited

Esso Inter-America, Inc.

Reliance Electric Company

Esso Europe, Inc.

Exxon Production
Research Company

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OPINIONS BELOW

The opinion of the Court of Appeal for the Fifth Circuit is reported at 688 F.2d 973 (5th Cir. 1982).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

FEDERAL RULES OF CIVIL AND APPELLATE PROCEDURE INVOLVED

The Federal Rules of Civil and Appellate Procedure relevant to the issues involved in this brief in opposition are cited in the foregoing Table of Authorities and set forth in pertinent part in the Appendix.

STATEMENT OF THE CASE

The majority of the facts in this statement are quoted verbatim from the Fifth Circuit Court of Appeal's opinion:

> David Tarlton was injured while serving as captain of the M/V BECT I, a vessel owned by Esserman Offshore Services, chartered to Exxon and operated by Golden Meadow Enterprises, Inc. The BECT I was used to service offshore platforms. On the day of Tarlton's accident, it delivered food supplies to an

Exxon platform on which Diamond M Drilling Company conducted drilling operations. Tarlton v. Exxon, et al, 688 F.2d 973, at p. 975 (1982).

After the food box was off-loaded, a Diamond M employee asked Tarlton to transport the empty food box, a few passengers and "some other small things" to shore. Tarlton agreed. At the time, seas were running six to eight feet. Notwithstanding the substantial seas, the platform crane operator, an employee of Diamond M, loaded tubular drill collars onto the deck of the BECT I. Tarlton was not aware the "small things" were drill collars until after they were placed aboard. It was imperative that the drill collars, which were rolling about the deck, be secured. While attempting to do so, Tarlton was injured. During this unfortunate scenario, late in the evening, Exxon's platform representative was not on the platform deck; he was asleep. Id. at 975.

"Tarlton initially filed a seaman's complaint against Diamond M and Exxon, later amending to add" additional parties not now before this Court. "Tarlton also alleged the unseaworthiness of the BECT I and sought maintenance and cure in his claim." Ibid.

* * * *

> As the parties went to trial, Exxon and Diamond M agreed that Exxon would indemnify Diamond M if "a final judgment, after completion of all post-trial motions, appeals, etc. is entered, finding the plaintiff's alleged injuries were proximately caused by the joint negligence of Diamond M and Exxon." Ibid.
>
> The case was tried to a jury, which returned a special verdict finding Diamond M and Exxon liable to Tarlton, with fault percentages of 95% and 5%, respectively. Ibid.

* * * *

> Based on the verdict, the district judge entered judgment on the main demand on March 27, 1980, casting Diamond M for $427,500.00 and Exxon for $22,500.00. Within ten days, on April 7, 1980, Exxon moved for a judgment n.o.v., a new trial, or in the alternative, remittitur. Although initially opposed, Diamond M sought at this hearing to orally join in Exxon's motions. On June 3, 1980, the trial court granted Exxon's request for judgment **non obstante veredicto** and dismissed Tarlton's claim against it. Acting **sua sponte**, the court simultaneously ordered a new trial on the issue of damages, "unless plaintiff remits $75,000.00 of the jury award." **Id.** at 977.

The Fifth Circuit Court of Appeal, in addition to ruling on other issues not before this Court, held in vacating the order for a new trial on the issue of damages that the order was untimely. The court also reinstated "...the judgment based on the jury verdict,

modified to delete the adjustment attributable to the jury's finding of Exxon's 5% negligence, thus casting Diamond M for the full amount of damages awarded by the jury." Ibid.

Based on a review of the record and the testimony in the case, the Fifth Circuit further held "...beyond peradventure that the cause of the accident was the decision by the Diamond M crane operator to 'sneak' the drill collars on board the BECT I." As noted by the court, "...[t]he crane operator admitted he had to act stealthily because he believed Captain Tarlton would not have allowed him to load the tubular drill collars on the vessel." Ibid.

As the court observed, since the Exxon representative was asleep at the time of the accident, he did not

authorize or order the loading, nor was he even aware that the crane operator might surreptitiously place the drill collars on the vessel.

The only remaining basis suggested to the court for finding Exxon negligent was that it condoned or failed to terminate the type of conduct by its contractor that resulted in the accident, i.e. loading tubular drill collars in six to eight foot seas. In responding to this issue the Fifth Circuit held that Diamond M had not crossed "...the legal hurdle that a principal (here Exxon) cannot be held answerable for failing to supervise an independent contractor." Id. at 976 n.3. Further, the court suggested that a platform owner will not be held negligent for dispatching a vessel in rough seas, which is a common activity

at offshore platforms in the gulf. The court cited Hebron v. Union Oil Co. of Calif., 634 F.2d 245 (5th Cir. 1981) as legal precedent supporting this proposition. Since Exxon could not be held negligent for failing to supervise an independent contractor which loaded tubular drill collars in six to eight foot seas,[1] or for the mere dispatching of the vessel, the Fifth Circuit affirmed the district judge, concluding that the judgment n.o.v. was properly granted.

---

1 The practice of loading drill collars on board vessels in marginal sea conditions was that of Diamond M and not Exxon. The evidence established that the prior occasions did not involve Exxon employees or equipment, but rather it was the Diamond M employees themselves who admitted undertaking such activities. Also, Exxon had no obligation to stop the unsafe work methods of its independent contractor. Tarlton v. Exxon, et al., 688 F.2d 973, 976 n.3 (1982).

REASONS FOR DENYING THE WRIT

Respondent respectfully submits that the writ should be denied for the following reasons:

(1) The Fifth Circuit Court of Appeal did not abolish petitioner's right to post-judgment relief in the trial court by reversing the trial judge's order for a new trial, conditioned on plaintiff's refusal to accept remittitur. Instead, the court was applying the Federal Rules of Civil Procedure, as written. Further, petitioner had a right to move for a new trial, either within the time constraints of Rule 59(b), or as provided in Rule 50(c)(2), but failed to exercise either opportunity;

(2) Under the guise of misuse of judicial notice at the appellate level, petitioner seeks to have this Court review the factual determinations in which both the trial and appellate courts concurred. This alone should serve as the basis to deny certiorari on this issue. In addition, the Hebron holding, even as misstated by petitioner, was not the controlling issue relied on by the district court and the Fifth Circuit in granting and affirming, respectively, the judgment n.o.v. in favor of Exxon.

POST-JUDGMENT RELIEF AT THE TRIAL LEVEL

Petitioner contends that the appellate decision abolishes the right to post-judgment relief from a super-

seding judgment against the originally successful litigant. Respondent respectfully disagrees and submits that petitioner did not timely exercise its right to post-judgment relief, and further, that the decision of the Court of Appeal for the Fifth Circuit was correct as rendered.

In reviewing the proceedings below, the court held that Diamond M's attempt to orally join in Exxon's motion for remittitur was untimely, since it occurred after the ten days provided for in Rule 59(b) of the Federal Rules of Procedure. In addition, in reversing the district court, the appellate court held that the district judge's **sua sponte** order for a new trial conditioned on non-acceptance of the remittitur was entered more than ten days after the

judgment of March 27, 1980, and did not comply with the requirements of Rule 59(d).

Absent a timely motion by Diamond M or an order by the trial judge within the ten day rule, the appellate court held that the trial judge was without jurisdiction to grant a sua sponte order for a new trial. Gribble v. Harris, 625 F.2d 1173 (5th Cir. 1980); Albers v. Gant, 435 F.2d 146 (5th Cir. 1970).

The Fifth Circuit rejected Diamond M's argument that "judgment" as used in Rule 59(d) means "final judgment," and thus that Exxon's motion, which extended the time for filing a notice of appeal under Rule 4(a)(4) of the Federal Rules of Appellate Procedure,

should also extend the time for a sua sponte order for a new trial under Rule 59(d).

The court properly concluded that the purpose of Rule 59(d) is primarily to correct errors in the verdict, which errors should be immediately apparent when the verdict is returned, and accordingly, the trial court should act with dispatch under the rule. In contrast, Rule 4(a)(4) is designed, at least in part, to dispose of all post-trial motions before a notice of appeal is given effect, in order to preserve all issues in litigation for consolidated appeal.

In its petition for certiorari to this Court, petitioner now attempts to focus on the remittitur portion of the trial court's sua sponte order, having been unsuccessful in persuading the

Fifth Circuit to judicially modify the Federal Rules of Civil Procedure regarding motions for new trial. Respondent submits that the post-judgment relief, which petitioner contends was denied it by the Fifth Circuit's holding, must be exercised within the constraints imposed by Rule 59(d), whether that relief is captioned "remittitur," an order for a "new trial," or as in the instant case, an order for a "new trial conditioned on remittitur."

The practice of conditioning an order for a new trial upon a plaintiff's acceptance of remittitur is "now sanctioned by long useage." 11 Wright & Miller, Federal Practice & Procedure § 2815 at 100 (1973).

This Court noted in Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935), "that in a case involving a remittitur... the doctrine (of conditioning an order for a new trial on the acceptance of a remittitur) would not be reconsidered or disturbed at this late day." Id. 293 U.S. at 485, 55 S.Ct. at 300, 79 L.Ed. at 610, as quoted in 11 Wright & Miller, Federal Practice and Procedure § 2815 at 102 and 103 (1973).

However, a trial judge's conditioning an order for a new trial on remittitur must meet the ten day mandatory and jurisdictional requirement of Rule 59(d), as properly held by the Fifth Circuit in this case.

Further, Cornist v. Richland Parish School Board, 479 F.2d 37 (5th Cir. 1973), strongly relied on by

petitioner as precedent for commencing the ten day period in which to bring a motion for a new trial, is not controlling on the facts now before this Court. Cornist, deals with a judgment, mutually agreed upon as to form by the parties, and submitted to the trial court to correct the first judgment which erroneously contained a provision dealing with the reinstatement of another teacher. The substantive versus clerical correction dichotomy was used by the court to determine that the correcting judgment began the time period for a motion for new trial.

However, in the instant case, there is no mutually agreed-upon correction to a provision erroneously included in the first judgment. Here, the period permitted for the trial

judge to order a new trial on damages, conditioned on acceptance of remittitur, commenced with the entry of the judgment on the jury's damage verdict, which error, if any, would be immediately apparent when it was returned. The subsequently granted judgment n.o.v., which reversed liability among adversarial parties defendant, had no impact on the quantum of damages.

In addition to the post-judgment relief available to petitioner under Rule 59(a) (if timely filed under Rule 59(b)), respondent submits that petitioner could have brought a motion for new trial within ten days of the June 3, 1980 judgment n.o.v. dismissing Exxon from the instant case, under Rule 50(c)(2). As petitioner correctly observes, the effect of the judgment n.o.v. dismissing Exxon was to shift

liability from Exxon to Diamond M for the full amount of the jury award, due to the indemnity agreement and record stipulation between Exxon and Diamond M. Thus, Diamond M was in a position to seek post-judgment relief pursuant to Rule 50(c)(2), but did not.[2]

Consequently, when petitioner failed to bring a motion for new trial either under Rule 59(a), in response to the judgment of March 27, 1980; or under Rule 50(c)(2), in response to the judgment n.o.v. of June 3, 1980, petitioner waived its right to post-judgment relief. Thus, there has been no "erosion" of petitioner's rights to

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2 It should be noted that, unlike Rule 59(d), which would permit an order sua sponte by the trial judge subsequent to rendering the judgment n.o.v., there is no similar provision in Rule 50(c)(2).

post-judgment relief, and there is no basis for granting the petition on this issue.

JUDICIAL NOTICE AT THE APPELLATE LEVEL

In its brief to this Court, petitioner contends that the Fifth Circuit Court of Appeal has misused judicial notice of facts in holding that Exxon was not negligent in this case. Petitioner has focused on the citation of legal precedent by the appellate court, claiming that the citation is judicial notice of facts. Respondent submits that this is merely an effort to argue factual issues before this Court, which alone should serve as the basis for denial of certiorari on this issue.

As noted in United States v. Johnston, 268 U.S. 220, 227, 45 S.Ct. 496, 497, 69 L.Ed. 925, 926 (1925),

the Supreme Court does not "grant a certiorari to review evidence and discuss specific facts." Particularly where the appellate court has affirmed the district judge's findings of fact, "[a] court of law, such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts in the absence of a very obvious and exceptional show of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275, 69 S.Ct. 535, 538, 93 L.Ed. 672, 677 (1949), quoting other cited cases; Berenyi v. Immigration Director, 385 U.S. 630, 635, 87 S.Ct. 666, 670, 17 L.Ed.2d 656, 661 (1967); Fed. Rules Civ. Proc., Rule 52, 28 U.S.C.A.

In the instant case, in its brief to the Fifth Circuit, petitioner sought reversal of the trial judge's granting of judgment n.o.v. in favor of Exxon. Based on a review of the record, the Fifth Circuit held under the standard articulated in Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc), that there was not a conflict in substantial evidence so as to create a jury issue regarding the alleged negligence of Exxon. In the words of the court, "having walked the same path as the trial judge, we reach the same conclusion." Tarlton v. Exxon, et al., 688 F.2d 973, 976 (5th Cir. 1982).

The essence of petitioner's factual argument before this Court is that Exxon had an established practice of loading tubular goods in six to eight foot seas, which practice

influenced the crane operator to load tubular goods surreptitiously on the vessel. Now, under the guise of pleading misuse of judicial notice at the appellate level, petitioner seeks to have this Court address these same factual issues previously reviewed by the district court, at trial and consideration of judgment n.o.v., and the Fifth Circuit, both on initial argument and at motion for rehearing.

Further, a close reading of the Fifth Circuit's opinion reveals that the decision in Hebron v. Union Oil Co. of California, 634 F.2d 245 (5th Cir. 1981) was not even the primary factor in the court's affirming the district judge's granting of judgment n.o.v. in favor of Exxon. Rather, in reviewing the record, the appellate court noted that the Exxon representative on the

platform was asleep at the time of the accident, and thus, was not alerted to the "surreptitious" placing of drill collars aboard the vessel without the captain's consent.

In response to Diamond M's contention that Exxon representatives had previously condoned loading vessels in six to eight foot seas, the court held as follows:

> Diamond M would visit negligence upon Exxon for not preventing the loading. But it must be remembered that Diamond M was an independent contractor on Exxon's platform. The crane, the drill collars and the employees involved in the accident were under Diamond M's control. Consequently, aside from the fact that the Exxon representative did not order or authorize the loading of the tubular drill collars in seas running six to eight feet, Diamond M must cross the legal hurdle that a principal cannot be held answerable for failing to supervise an independent

contractor. See McCormick v. Noble Drilling Corporation, 608 F.2d 169 (5th Cir. 1979). This has not been done. Tarlton v. Exxon, et al., 688 F.2d 973, 976 n.3 (1982).

Thus, even before referring to Hebron in its opinion, the court had already held that Exxon could not be held negligent in allegedly condoning previous practices by an independent contractor.

Only in further support of its holding that Exxon was free of negligence, did the court cite the Hebron case. There, it was noted that "a platform owner is not negligent for dispatching a vessel in six to eight foot seas, seas admittedly rough but not necessarily dangerous for loading or unloading. Such activity is not at all unusual at the myriad offshore

platforms in the gulf." Tarlton v. Exxon, et al., 688 F.2d 973, 976-977 (1982).

The Hebron decision was cited for the proposition that dispatching alone of a vessel in rough seas is not negligent. Nowhere in the appellate opinion referring to Hebron does the court take judicial notice that it is not negligent to dispatch a vessel in six to eight foot seas in order to load tubular drill collars, as petitioner repeatedly contends in its petition to this Court.

Nor was it necessary for the court to make such a statement. Having held that a principal is not answerable for failing to supervise an independent contractor in loading tubular drill collars in six to eight foot seas, the responsibility for the alleged practice

was properly placed on the contractor. As the evidence established, the prior occasions of off-loading drill collars did not, in fact, involve Exxon employees or equipment, but rather the Diamond M employees themselves, who admitted undertaking such activities. Thus, the Hebron citation stands solely for the proposition that dispatching alone of a vessel in these conditions is not a negligent practice.

The following statement, which the court makes after citing Hebron, further establishes that the court's decision was based on a review of the record, and not as petitioner contends, based on improperly exercised judicial notice:

> Our review of the testimony convinces us beyond peradventure that the cause of the accident was the decision by the Diamond M crane operator to "sneak" the drill collars on board the BECT I. The

> crane operator admitted he had to act stealthily because he believed Captain Tarlton would not have allowed him to load the tubular drill collars on the vessel. In view of this testimony and the other evidence, we are in total agreement with the district judge that "[i]t was the decision to load the drill collars onto plaintiff's vessel which was the negligence which caused plaintiff's injury." The judgment n.o.v. was properly granted. (emphasis added) Tarlton v. Exxon, et al., 688 F.2d 973, 977 (1982).

Petitioner also requests that this Court simply reverse the decision of the appellate court, without more. Respondent respectfully submits that, in the unlikely event that this Court should reverse on this issue, remand would be required to enable the district court to consider Exxon's motion for a new trial, on which it did not rule. As noted earlier in this brief, following the trial in this case

Exxon filed timely motions for judgment n.o.v., new trial and alternatively, remittitur. The district judge granted the judgment n.o.v.; however, the court did not rule on the motion for new trial.

Rule 50(c) of the Federal Rules of Civil Procedure requires that when a motion for new trial is joined with a motion for judgment n.o.v., the trial judge must rule on both motions, even though the judgment n.o.v. has been granted. 5A MOORE'S FEDERAL PRACTICE ¶ 50.13[1] (2 ed. 1980).

Therefore, in the event the judgment n.o.v. is reversed by this Court, the case must be remanded to the district court to consider Exxon's motion for a new trial. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61

S.Ct. 189, 85 L.Ed. 147 (1940); Nodak Oil Company v. Mobil Oil Corp., 526 F.2d 798 (8th Cir. 1975).

INFLATION

Respondent does not oppose the petition for certiorari with respect to the issue of inflation in the determination of damages in the instant case.

However, for the reasons outlined in respondent's brief in opposition regarding the issues of post-judgment relief and judicial notice, respondent submits that the writ of certiorari, if granted, should be limited to the question of jury instructions on inflation in determining damages.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for certiorari should be denied.

Original Signed by
E. BURT HARRIS

E. BURT HARRIS
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has been served upon counsel of record herein for all parties by depositing copies of same in the United States mail, first class postage prepaid, properly addressed.

NEW ORLEANS, LOUISIANA, this 15th day of April, 1983.

Original Signed by
E. BURT HARRIS

E. BURT HARRIS

APPENDIX

The pertinent parts of the Federal Rules of Civil and Appellate Procedure involved in the issues in this brief in opposition to the petition for writ of certiorari are as follows:

Federal Rules of Civil Procedure:

> **RULE 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict** * * * *
>
> (c) **Same: Conditional Rulings on Grant of Motion.**
>
> (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally

granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set

forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A New trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at

law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On Initiative of Court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) **Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Federal Rules of Appellate Procedure:

Rule 4. Appeal as of Right -- When Taken

(a) **Appeals in Civil Cases.** * * * *

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under

Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.